UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

TIMOTHY J. DYER,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 99-55-B***
	)	
KENNETH S. APFEL,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

The issues presented in this Supplemental Security Income ("SSI") and Social Security Disability ("SSD") appeal are whether the administrative law judge posed improper hypothetical questions to the vocational expert, allowed the vocational expert to interpret raw medical data, improperly determined the plaintiff's residual functional capacity ("RFC") and/or improperly dismissed the plaintiff's testimony concerning pain. I recommend that the court vacate the commissioner's decision and remand for further proceedings.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. §§ 404.1520,

[1] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on November 17, 1999 pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

416.920; *Goodermote v. Secretary of Health & Human Servs*., 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff had a mild spinal disorder and an anxiety disorder, which were severe impairments but neither alone nor in combination met or equaled the criteria of any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 ("the Listings"), Finding 3, Record p. 17; that he retained the residual functional capacity to walk two miles, perform work at the medium exertional level, understand detailed instructions, perform work that is consistent with mild to moderate problems with concentration and minor limitation in persistence and pace, interact normally socially, and meet new people and groups of people, Finding 4, Record p. 17; and that he could return to his past relevant work as a carpenter's helper or an automotive service station attendant, Finding 5, Record p. 17. The administrative law judge concluded that the plaintiff was not disabled under the Social Security Act through the date of the decision and was not entitled to a period of disability or disability insurance under the Act. Record p. 17. The Appeals Council declined to review the decision, *id*. at 4-5, making it the final decision of the commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence, 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs*., 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

Discussion

The administrative law judge's decision was made at Step 4 of the evaluative process, where the burden remains with the claimant to show that he cannot return to his former employment due to a disability. *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Santiago v. Secretary of Health & Human Servs.*, 944 F.2d 1, 5 (1st Cir. 1991).

Residual Functional Capacity

The first issue raised by the plaintiff concerns the hypothetical question posed to the vocational expert by the administrative law judge, who asked whether the plaintiff could do any of his past relevant work given an ability to do a full range of medium work and the findings of a psychological consultant, Willard Millis, Jr., Ph.D. Record at 65-66, 208. The plaintiff contends that the conclusion that he was capable of medium level work is inconsistent with the physical limitations found by a consulting physician, Chester C. Suske, D.O., *id*. at 212-15, who had treated the plaintiff once several years earlier, *id*. at 198-201, and the conclusion of the non-examining medical consultants who found him to have a capacity for light work, *id*. at 157, 185, 190, and that the administrative law judge improperly allowed the vocational expert to "provide her own evaluation of mental RFC directly from the psychologist's report," Statement of Errors (Docket No. 5) at 5-8.[2]

[2] The plaintiff's statement of errors refers in passing to the administrative law judge's "failure to use experts for evaluation of RFC." Statement of Errors at 7. If this is meant to be a suggestion that the administrative law judge improperly evaluated raw medical evidence in reaching his assessment of the plaintiff's residual functional capacity, the suggestion is incorrect. There are several medical evaluations of the factors relevant to a determination of residual functional capacity in the record and there was accordingly no need for the administrative law judge to call upon the assistance of a medical advisor at the hearing in order to evaluate the plaintiff's residual functional capacity from a physical point of view. *See generally Rodriguez Pagan v. Secretary of Health &*
(continued...)

The latter contention is clearly incorrect. The administrative law judge merely asked the vocational expert to assume the limitations specifically found by the psychological consultant in his report — that the plaintiff "would seem to have some mild to moderate problems with concentration much of the time because of the anxiety[, p]ersistence and pace also would seem to be effected [sic] to some minor extent[, and s]ocial interaction skills are basically within normal limits," Record at 210 — in reaching her opinion concerning the plaintiff's ability to do his past work, *id*. at 65, 71-72. This was not an inappropriate use of the consultant's report and it did not in any way constitute a request that the vocational expert draw conclusions concerning the plaintiff's mental capacity. Indeed, this use of the consultant's report does not differ in any significant way from the use approved by the court in *Perez v. Secretary of Health & Human Servs*., 958 F.2d 445, 447 (1st Cir. 1991).

The plaintiff's former contention is worthy of more detailed consideration. However, contrary to the plaintiff's statement that Dr. Suske in his 1997 consultation "imposed" limitations, a review of Dr. Suske's report reveals that, at the page of the record cited by the plaintiff, Dr. Suske was merely repeating the plaintiff's report to Dr. Suske concerning his physical activity. Record at 215. Dr. Suske's report does not impose, or even suggest, any physical limitations. He recommended increased exercise and further medical tests. *Id*. at 214. Dr. Suske did find "[m]echanical back pain due to prior back injury," *id*., but this general finding does not support the imposition of any particular limitations in the context of a question to a vocational expert.

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[2](...continued)
Human Servs., 819 F.2d 1, 5 (1st Cir. 1987) ("[u]se of a medical advisor in appropriate cases is a matter left to the [commissioner's] discretion; nothing in the [Social Security] Act or regulations requires it").

The administrative law judge's opinion does not mention the residual functional capacity assessments of the two non-examining consultants, *id*. at 150-57, 180-91, nor the medical records from 1990, 1991 and 1996, *id*. at 192-207. The administrative law judge found support for his conclusion that the plaintiff retained the capacity for medium work in Dr. Suske's report. *Id*. at 14-15. However, as noted previously, Dr. Suske did not discuss limitations that may be medically indicated, and certainly did not cast his report in the terms used to determine residual functional capacity. The record includes a functional capacity evaluation dated July 18, 1990 by a physical therapist that found the plaintiff, after testing, to have moderate lumbrosacral back pain and arm weakness, and to be capable of sedentary work with a capacity for light work with a rehabilitation program. *Id*. at 194-96. On August 8, 1990 a different physical therapist reported that the plaintiff had been referred to an aquatics program for 6 to 8 weeks for treatment of lumbrosacral sprain. *Id*. at 193. Dr. Suske's records from 1990 and 1991 are essentially illegible. *Id*. at 198-201.[3] The other medical records do not address back pain in a manner that sheds any light on the plaintiff's claims. *Id*. at 202-07.

The commissioner defines medium work as follows: "Medium work involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds." 20 C.F.R. §§ 404.1567(c), 416.967(c). The two non-examining consultants established exertional limitations for the plaintiff of occasionally lifting 20 pounds and frequently lifting 10 pounds, Record at 151, 185, which are not compatible with a capacity for medium work. One of the two consultants specifically found a capacity for light work. *Id*. at 157. While the administrative law judge could

[3] The plaintiff testified that at the end of 1990 his doctor released him to go back to work for 20 hours per week on light duty. Record at 34. Dr. Suske's entry for July 2, 1990 in his records includes "cont[inue] find[ing] light duty." *Id*. at 201.

have chosen to rely on the report of a treating or examining consultant physician that disagreed with these findings, *see Rose v. Shalala*, 34 F.3d 13, 18-19 (1st Cir. 1994), there is no such report in the record. Given the lack of evidentiary support for the administrative law judge's conclusion regarding residual functional capacity at Step 4 of the evaluative process, the plaintiff is entitled to a remand for further proceedings.

Pain and Credibility

While it is not necessary to reach the second issue raised by the plaintiff under the circumstances, the following observations may make it less likely that this issue will arise again should the court agree with my recommendation that this matter be remanded to the commissioner.

The plaintiff attacks the following paragraph in the administrative law judge's opinion, which is not included the section of the opinion entitled "Findings":

> The Administrative Law Judge has evaluated the intensity, persistence, and limiting effects of the claimant's symptoms, and finds that his statements regarding his symptoms are not fully consistent with the objective medical evidence and the other evaluative factors of 20 C.F.R. § 404.1529(c)(3). The claim of "constant pain" in his back is belied by his statements of being able to be quite active exertionally, the household activities he is able to perform, and the fact that he has not sought treatment from medical professionals for this alleged severe back pain.

Record at 16. The plaintiff is concerned with this paragraph only to the extent that it addresses his claim of pain. Statement of Errors at 8-13.

I begin with the observation that the plaintiff did not testify at the hearing that he had constant pain in his back. He testified that full-time carpentry work in July 1997, five months before the hearing, where he was lifting 10 to 20 pounds on a regular basis and getting up and down off his knees, "bothered [his] back," and that he "probably could [work] for a short extent until [his] back

really started bothering [him]." *Id*. at 45-46, 48. The medical evidence of back pain in the record is found primarily in the physical therapist's report from 1990. Dr. Suske recorded what the plaintiff told him about his back pain, *id*. at 212-15. The plaintiff stated in his report of activities of daily living dated September 26, 1996 that "[m]y back aches all the time now." *Id*. at 144. If it is to either of these reports that the administrative law judge's opinion refers, there is other evidence in the record that supports the administrative law judge's conclusion that the plaintiff's pain is not as extensive as he reported it to be. While it is true that the plaintiff's failure to pursue medical treatment may not be used to discredit his testimony concerning pain where there is evidence that he did not seek treatment because he could not afford it, Social Security Ruling 96-7p, *reprinted in West's Social Security Reporting Service* Rulings 1983-1991, Supp. 1999-2000, at 142-43, the evidence to that effect in the record concerns only 1997, Record at 212, and the plaintiff's apparent failure to follow the reconditioning program prescribed in 1990, *id*. at 193, 196, 214 (finding "[d]econditioning" in 1997), could be considered by the administrative law judge. The plaintiff's listing of household activities[4] — he reported that he took out the trash, made some of his own meals, went shopping, drove a car, hunted three or four hours a day for a two week period, went bowling two or three times a year, did small repairs around the house and on his car — and his testimony concerning his activities at the construction job in July 1997 and while working other odd jobs, *id*. at 43-48, 137-44, 149, provide a basis for the administrative law judge's doubts about the plaintiff's credibility on this issue.

Still, the evaluation of the plaintiff's allegations of pain provided by the administrative law

[4] Contrary to the plaintiff's argument, Statement of Errors at 13, the administrative law judge did not use the evidence concerning the plaintiff's household activities to establish his residual functional capacity, but merely to cast doubt on his testimony about pain.

judge in his opinion falls short of the requirements established by the First Circuit in *Avery v. Secretary of Health & Human Servs*., 797 F.2d 19 (1st Cir. 1986). While the administrative law judge refers to the specific evidence that he considered in deciding to discount the plaintiff's testimony regarding pain, there is no indication that he considered the *Avery* factors. 797 F.2d at 29 (appendix). *See Guyton v. Apfel*, 20 F.Supp.2d 156, 166 (D. Mass. 1998). Explicit reference to those factors in the administrative law judge's opinion would be the only means to determine, in this case, whether they were considered. Under the circumstances of this case, however, it is not necessary to determine whether the absence of such consideration is sufficient to require remand.

Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **VACATED** and the cause **REMANDED** for further proceedings consistent herewith.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 22nd day of November, 1999.

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David M. Cohen
United States Magistrate Judge